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NOTE AND COMMENT

THE OWNERSHIP OF SUNKEN LOGS.—The case of *Whitman* v. *The Muskegon Log Lifting & Operating Company*, 152 Mich. 645, 116 N. W. Rep. 614, decided by the Supreme Court of Michigan a few months ago, involves questions of more than passing interest, particularly in those states where extensive river-logging operations have been carried on. The case arose over the ownership of sunken and deadhead logs in Muskegon River, which was at one time one of the greatest logging rivers in the United States, and illustrates to a marked degree the growing scarcity of forest products and the bitter struggles that are already being carried on to reclaim some of the profligate waste of former years.

The Log Lifting Company, the defendant in the case, had been organized for the purpose of raising sunken and deadhead logs from the bed of Muskegon River, and it had contracted with the owners of a large number of recorded log marks to raise from the bottom of the river logs bearing their marks and float them to their mills at Muskegon for an agreed consideration. On many of the logs which were recovered the mark had become obliterated or been made undecipherable by the abrasive action of water and sand, and

upon these logs the defendant company had placed its own mark as soon as they were raised. This was done in pursuance of the agreements made with the log owners for whom defendant company was operating and with their consent.

The logs, after they had been raised from the bed of the river, were placed upon the banks of the river at different points in rollways to dry, preparatory to floating them down the stream. About 2,400,000 feet had been raised and placed on the banks of the river in this manner when the complainant, a riparian proprietor, brought suit to restrain the defendant company from making any further efforts to recover logs, both marked and unmarked, from the river adjacent to his land, and from removing those which it had already recovered and placed upon his property. His claim was that the marked logs had been abandoned by the original owners and, if not abandoned, they were in the same situation as the unmarked logs because the marks were improperly recorded, and that all logs, both marked and unmarked, belonged to the riparian proprietor by virtue of his ownership of the soil to the thread of the stream.

The defendant company contended that the marked logs had not been abandoned by the owners of the marks, and were still the property of such owners who could identify them by such marks; that the unmarked logs belonged to it by virtue of a custom, recognized and existing among log operators on Muskegon River, that all unmarked logs discovered in the course of a drive or found among those raised from the bottom of the river should go to the company running the drive or raising the logs for the log owners, and that, even if the unmarked logs did not belong to it by virtue of such custom, they were in the nature of lost, derelict or abandoned property and, as such, would belong to the person first getting possession by raising them from the bottom. The defendant company also claimed that the recovery of such sunken and lost property was an incident of navigation and not an infringement of the rights of the riparian proprietor.

The court held it unnecessary to consider the construction to be placed upon the state statute providing for the recording of log marks and making the recorded mark prima facie evidence of the ownership of logs bearing such mark, as the failure to record the mark would deprive a log owner only of the presumption created by the statute and would not deprive him of the right to identify his property by means of the mark he had stamped thereon. As to the marked logs which had already been recovered and as to those still in the bottom of the river, it was held that, there being no proof of abandonment by the original owner, they still belonged to such original owner, whoever he might be, and no other person had any right, title or interest in them.

The interesting question in the case, however, arose as to the ownership of unmarked logs, and on that point the court held that the riparian proprietor had no interest in them whatever by virtue of his ownership of the soil to the thread of the stream and that they belonged to the defendant company by virtue of the contracts entered into with the parties for whom it was operating.

The testimony showed that, for more than thirty years, it had been the custom for booming companies engaged in running and rafting logs and raising sunken logs on Muskegon River to appropriate all unmarked logs which they found, and that this had been done with the consent and acquiescence of all log owners and operators, and that complainant himself had in years past worked for the booming company in raising sunken logs from the stream along his land and had never made any claim to them. The testimony also showed that the defendant company was the successor of the old booming companies, as far as the work of raising sunken logs was concerned, and that defendant company had contracts with the owners of a large majority of the marks ever used upon Muskegon River to raise logs bearing their marks and float them to their mills at Muskegon. In the contracts so made, it was agreed that the defendant company should have the right to appropriate all unmarked logs which it recovered as part of the consideration for the recovery and delivery of the marked logs.

In arriving at the conclusion that the unmarked logs belonged to the defendant company and not to the riparian proprietor on whose submerged land they happened to be lying, the court held, first, that the unmarked logs could not be considered as lost or abandoned, and second, that, not being lost or abandoned, the original owners had a right to contract with reference thereto and, according to a custom recognized and existing on the river as to the ownership of unmarked logs, to allow defendant company to take such of the logs as were without marks.

Had the defendant company represented the owners of all the marks that had ever been used upon Muskegon River, this rule annunciated by the court would have occasioned no difficulty in its application, because, in that event, there would have been no doubt as to the ownership of the unmarked logs. They would all have belonged to the parties for whom defendant company was operating, and they could have made any disposition of them that they saw fit. The testimony showed, however, that while defendant company represented the owners of a large number of the log marks that had ever been used upon the river, they did not represent the owners of all of such marks.

While it is probably true under the findings of the court that originally most of the unmarked logs which were recovered bore the marks of and belonged to the log owners for whom defendant company was operating, and, while the lack of testimony as to the abandonment of the marked logs applied with equal force to the unmarked logs, a difficulty arises in the application of the court's rule that the logs were neither lost nor abandoned by the original owners and were still the subject of ownership and transfer by them, when considered with reference to any particular unmarked log.

It is rather difficult to see how the log owners for whom defendant company was operating could have established their title to a single unmarked log as against any other log owner who had operated on that river or as against a finder and actual possessor of such an unmarked log. When a log has lost all distinguishing marks of ownership, when it no longer possesses

any "ear marks" by which the original owner can identify it as his own or as having at one time been in his possession, how can he make proof of title as against a person in actual possession of the log? If, in the case under discussion, the riparian proprietor, or any other person, had recovered these unmarked logs, what proof of ownership could defendant company or the log owners for whom it was operating have made in an action of replevin brought to regain their possession? Would a showing that the parties for whom defendant company was operating were the owners of a large number of all of the marks that had ever been used upon Muskegon River have been sufficient to show right to possession and to a maintenance of the action? Would it not have been necessary to show that the parties maintaining the action owned or represented the owners of all of the marks that had ever been used on Muskegon River or represented all persons who had ever placed logs in the river for purposes of transportation? While a showing, such as was made in this case, as to the ownership of marks by parties for whom defendant company was operating, might have been sufficient to indicate probable ownership of a large majority of the unmarked logs which were recovered, under that showing, there could, of necessity, have been no such definite ascertainment as to the ownership or right to possession of any particular unmarked log as would constitute a sufficient basis for a recovery in an action of replevin.

In holding that the unmarked logs in the bottom of the river could be considered neither lost nor abandoned by the original owners, the court does not seem to have considered the difficulties of applying that rule when it came to proving ownership to any particular unmarked log by a log owner who may have owned it at some time in the past. It being impossible to identify an unmarked log or to ascertain to whom it originally belonged, the conclusion seems irresistible that such a log in the bottom of Muskegon River, while it may not have been intentionally abandoned by its original owner, must be considered as lost and beyond his control, because of his inability to show his prior possession or title, and that, while a riparian proprietor might have no interest in such a log by virtue of his riparian ownership, the title of a finder and actual possessor would be paramount and unassailable.

COMBINATION AMONG PHYSICIANS TO FIX PRICES FOR PROFESSIONAL SERVICES.—The case of *Rohlf* v. *Kasemeier et al.*, decided by the Supreme Court of Iowa, November 18, 1908, and reported in 118 N. W. Rep., p. 276, although primarily upon the construction of a local statute, involves a question of general interest. The plaintiff therein, who is a physician, together with thirteen others of the same profession, all residing and practicing in the same county, entered into an agreement, combination or understanding, the terms of which are not given, but the object of which was to fix and maintain the fees and charges to be exacted for medical and surgical services in said county. The code of the state provided that "any corporation organized under the laws of this or any other state or country for transacting or con-